

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33602

STATE OF IDAHO,	)	
	)	2008 Opinion No. 90
Plaintiff-Respondent,	)	
	)	Filed: October 22, 2008
v.	)	
	)	Stephen W. Kenyon, Clerk
ALEXANDER BARCLAY, III,	)	
	)	
Defendant-Appellant.	)	
	)	

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Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John T. Mitchell, District Judge.

Order relinquishing jurisdiction, affirmed.

Amendola, Andersen & Doty, Coeur d' Alene, for appellant. Gary I. Amendola argued.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent. Rebekah A. Cudé argued.

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PERRY, Judge

Alexander Barclay, III, appeals from an order relinquishing jurisdiction. Barclay also asks us to review his unified sentence of four years, with a minimum period of confinement of two years, for possession of a controlled substance. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Barclay was arrested when officers responded to his home for a reported domestic dispute. Barclay's wife told the police that she was attempting to leave the home following a verbal argument and that Barclay grabbed and pushed her. She also told officers that Barclay was attempting to get rid of marijuana by flushing it down the toilet. According to police, Barclay admitted to flushing the marijuana down the toilet and to possessing several marijuana pipes, but he refused consent to a search of his bedroom or his car.

Barclay's wife removed several marijuana pipes, methamphetamine pipes, and baggies containing methamphetamine or marijuana from Barclay's bedroom and car. Barclay's wife turned these items over to the police. Barclay was charged with domestic battery, possession of marijuana, possession of drug paraphernalia, destruction of evidence, and possession of methamphetamine. Barclay entered a guilty plea to possession of methamphetamine, I.C. § 37-2732(c), and the remaining charges were dismissed.

The district court withheld judgment and placed Barclay on probation. Less than two months later, Barclay was found to have violated several terms of his probation by, among other things, failing drug tests for both marijuana and methamphetamine and receiving a new charge of burglary. Barclay pled guilty to the burglary charge. I.C. § 18-1401. The two cases were consolidated for sentencing. The district court set aside Barclay's withheld judgment, revoked his probation, and sentenced him to a unified term of four years, with a minimum period of confinement of two years, for possession of methamphetamine.<sup>1</sup> However, the district court retained jurisdiction.

Near the end of the first period of retained jurisdiction, the North Idaho Correctional Institution (NICI) staff recommended relinquishing jurisdiction. The district court noted that Barclay had not received the substance abuse treatment it recommended and that Barclay had not provided a plan detailing the steps necessary for his successful completion of probation. Therefore, the district court ordered a second period of retained jurisdiction. Near the end of the second period of retained jurisdiction, the NICI staff again recommended relinquishing jurisdiction. Thereafter, the district court relinquished jurisdiction. Barclay appeals.

### **III.**

#### **ANALYSIS**

##### **A. Second Retained Jurisdiction without an Intervening Period of Probation**

As an initial matter, we must address the state's contention that the district court lacked the jurisdiction to order a second period of retained jurisdiction in Barclay's case without having first placed him on probation. The state argues that I.C. § 19-2601(4) authorizes a court to order a second period of retained jurisdiction only if the defendant is first placed on probation at the

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<sup>1</sup> Barclay was sentenced to a six-month determinate term for burglary, with the sentence to be served concurrently with his sentence for possession of a controlled substance. Barclay does not challenge his burglary judgment of conviction or sentence on appeal.

end of the initial period of retained jurisdiction. In this case, the district court retained jurisdiction for 180 days. Near the end of those 180 days, and without placing Barclay on probation, the district court simply ordered another 180-day period of retained jurisdiction. The state contends that the district court did not have the statutory authority to order the second period of retained jurisdiction without first placing Barclay on probation.

This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). Constructions of a statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004).

Idaho Code Section 19-2601 governs commutation, suspension, and withholding of sentences and includes subsections on retained jurisdiction and probation. Subsection (4) was amended in 1998 and now provides, in relevant part, that “the court in its discretion may sentence a defendant to more than one (1) period of retained jurisdiction *after a defendant has been placed on probation in a case.*” I.C. § 19-2601(4) (emphasis added). The language dealing with a second period of retained jurisdiction was added apparently in response to the Idaho Supreme Court’s decision in *State v. Travis*, 125 Idaho 1, 867 P.2d 234 (1994). In that case, the district court sentenced Travis, but retained jurisdiction. At the conclusion of the first period of retained jurisdiction, the district court suspended Travis’s sentence and placed him on probation.

Travis violated the conditions of his probation and the district court revoked probation, but retained jurisdiction for a second time. On appeal, the state argued that the district court lacked the authority to order a second period of retained jurisdiction. The version of I.C. § 19-2601(4) at issue in that case did not contain any language providing for a second period of retained jurisdiction. Therefore, on appeal the Court concluded that the district court exceeded its authority under I.C. § 19-2601(4) by ordering a second period of retained jurisdiction. *Travis*, 125 Idaho at 7, 867 P.2d at 240.

The plain meaning of “after a defendant has been placed on probation in a case” from I.C. § 19-2601(4) leads us to conclude that a district court may order a second period of retained jurisdiction only after a defendant has been placed on an intervening period of probation. Absent inherent power, a sentencing court has only the authority granted by the legislature. *State v. Funk*, 123 Idaho 967, 969, 855 P.2d 52, 54 (1993). In response to the Idaho Supreme Court’s decision in *Travis*, and based on the facts of that case, the legislature amended I.C. § 19-2601(4) to provide a sentencing court with the authority to order a second period of retained jurisdiction only after suspending sentence and placing a defendant on probation. There is no indication that the legislature contemplated the authority exercised here--granting a second, consecutive retained jurisdiction effectively extending the period of retained jurisdiction from 180 to 360 days.<sup>2</sup> The district court here circumvented the 180-day limitation period placed on the retained jurisdiction program by the legislature. Therefore, we conclude that the district court lacked the authority<sup>3</sup> in this case to order the second period of retained jurisdiction without placing Barclay on an intervening period of probation.

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<sup>2</sup> When the legislature has determined that the length of the potential retention of jurisdiction is insufficient, it has extended the period of retained jurisdiction from 60 to 120 to 180 days. See 1972 Idaho Sess. Laws ch. 381, § 16; 1994 Idaho Sess. Laws ch. 33.

<sup>3</sup> Because the state asserts that the district court lacked the jurisdiction to order a second period of retained jurisdiction without placing Barclay on an intervening period of probation, it argues that Barclay’s appeal is untimely. The state argues that the time for his appeal began to run at the end of Barclay’s first retained jurisdiction review period.

We do not view the authority of the district court to order a second consecutive period of retained jurisdiction pursuant to I.C. § 19-2601(4) as a question of jurisdiction, nor do we consider the district court’s actions as affecting the timeliness of Barclay’s appeal. See *State v. Armstrong*, Docket No. 33868 (Ct. App. Aug. 15, 2008), *rev. pending*. In this case, Barclay appealed from the district court’s order relinquishing jurisdiction after Barclay’s second retained

## **B. Imposition of Sentence**

Although not entirely clear from his argument on appeal, Barclay appears to contend that the district court abused its discretion in relinquishing jurisdiction after his second period of retained jurisdiction and that the district court also abused its discretion in imposing an excessive sentence.

Because we conclude that the district court lacked the statutory authority to order a second period of retained jurisdiction without an intervening period of probation, we reject Barclay's challenge to the district court's failure to place him on probation after the second period of retained jurisdiction. *See Travis*, 125 Idaho at 7, 867 P.2d at 240.

The choice of sentence to impose is governed by the abuse of discretion standard. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of

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jurisdiction. Although we conclude that the district court was without the authority to order a second consecutive period of retained jurisdiction without an intervening period of probation, Barclay's appeal is not untimely; the adverse ruling that he challenges is the order relinquishing jurisdiction. Therefore, we will address the merits of Barclay's appeal.

the offender and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). A review of the record indicates that the district court did not abuse its discretion in sentencing Barclay to a unified term of four years, with a minimum period of confinement of two years, for possession of a controlled substance.

### **C. Additional Sentencing Term**

Barclay argues that the district court erred in placing an additional term in the order relinquishing jurisdiction that was not stated on the record at Barclay's second jurisdictional review hearing. The order relinquishing jurisdiction provides:

THE STATE OF IDAHO BOARD OF PARDONS AND PAROLE IS  
STRONGLY ENCOURAGED NOT TO CONSIDER YOU ELIGIBLE FOR  
PAROLE UNTIL HE HAS SUCCESSFULLY COMPLETED THE  
"THERAPEUTIC COMMUNITY" PROGRAM.

Although the district court did not make this precise statement on the record at Barclay's second jurisdictional review hearing, it did inform Barclay that it was "recommending the therapeutic community."

Under Idaho law, the legally cognizable sentence in a criminal case is the oral pronouncement in the presence of the defendant. *State v. Wallace*, 116 Idaho 930, 932, 782 P.2d 53, 55 (Ct. App. 1989). The legal sentence consists of the words pronounced in open court by the judge, not the words appearing in the written order of commitment. *Id.*; *State v. Dreier*, 139 Idaho 246, 254, 76 P.3d 990, 998 (Ct. App. 2003). Therefore, when there is a *disparity* between the sentence imposed in open court and that expressed in the written judgment of conviction, it is the orally pronounced sentence that is effective. *Dreier*, 139 Idaho at 254, 76 P.3d at 998; *State v. Watts*, 131 Idaho 782, 786, 963 P.2d 1219, 1223 (Ct. App. 1998).

The Commission on Pardons and Parole is vested with the discretion to grant or deny parole at any time after the completion of the determinate portion of a defendant's sentence. I.C. § 20-223(c); *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Because the commission is vested with the ultimate authority to grant or deny parole, the district court's recommendation that Barclay not be released until he has completed the therapeutic community is merely that, a recommendation. The commission may choose to follow the district court's

recommendation or it may not. However, because the ultimate decision rests with the commission, we conclude the district court's recommendation is not part of Barclay's sentence.

#### **IV.**

#### **CONCLUSION**

The district court lacked the statutory authority to order a second period of retained jurisdiction without an intervening period of probation. The district court did not abuse its discretion in sentencing Barclay to a unified term of four years, with a minimum period of confinement of two years, for possession of a controlled substance. A recommendation to the commission regarding Barclay's parole eligibility is not part of Barclay's sentence. Therefore, the order relinquishing jurisdiction and Barclay's sentence are affirmed.

Judge LANSING, and Judge Pro Tem WALTERS, **CONCUR.**